

Hon. John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
SEATTLE DIVISION

AMERICAN WHITEWATER; AMERICAN	)	No. 2:16-cv-00047-JCC
RIVERS, INC.,	)	
	)	SECOND AMENDED AND
Plaintiffs,	)	SUPPLEMENTAL COMPLAINT
	)	
vs.	)	
	)	
ELECTRON HYDRO, LLC; THOM A. FISCHER;	)	
TOLLHOUSE ENERGY COMPANY,	)	
	)	
Defendants.	)	
	)	

1. Plaintiffs American Whitewater and American Rivers, Inc. (“Plaintiffs”) hereby respectfully file this second amended and supplemental complaint against Defendants Electron Hydro, LLC, Thom A. Fischer, and Tollhouse Energy Company (“Electron”), to challenge operations of the Electron Hydroelectric Project (“Project”) on the Puyallup River in Washington. By maintaining, operating, and renovating the Project, Electron has unlawfully taken, and continues to unlawfully take, Chinook salmon, steelhead trout, and bull trout, all of which are listed as threatened with extinction under the Endangered Species Act (“ESA”).

Jurisdiction.

2. This Court has jurisdiction pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540, and because this case involves a federal question. 28 U.S.C. § 1331. On August 31, 2015,

1 Plaintiffs gave Electron notice of their intent to sue under the ESA. More than 60 days have  
2 elapsed since Electron received this notice. Plaintiffs seek relief authorized by the ESA and the  
3 Declaratory Judgment Act. 16 U.S.C. § 1540; 28 U.S.C. §§ 2201-02.

4 3. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. §  
5 1391(e). Seattle is the appropriate division within this district for this suit. LCR 3(d). Defendant  
6 Electron Hydro, LLC, Defendant Thom A. Fischer, and Defendant Tollhouse Energy, Inc. reside  
7 in Whatcom County. Plaintiffs American Whitewater and American Rivers have offices in King  
8 County.

9 4. A present and actual controversy exists between the parties to this action.

10 Parties.

11 5. Plaintiff American Whitewater was founded in 1954 and is a national non-profit  
12 organization whose mission is to conserve and restore America's whitewater resources and to  
13 enhance opportunities to enjoy them safely. American Whitewater is a membership organization  
14 representing a broad diversity of individual whitewater enthusiasts, river conservationists, and  
15 more than 100 local paddling club affiliates across America. American Whitewater is a primary  
16 advocate for preserving and protecting whitewater rivers throughout the United States, and  
17 connects the interests of human-powered recreational river users with ecological and science-  
18 based data to achieve the goals within its mission.

19 6. Plaintiff American Rivers is a national conservation group that protects wild rivers,  
20 restores damaged rivers, and conserves clean water for people and nature. Since 1973, American  
21 Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts,  
22 on-the-ground projects, and establishment of the annual America's Most Endangered Rivers®  
23 campaign. In, 2020, American Rivers listed the Puyallup River among America's Most  
24 Endangered Rivers® due to the effects of the Project on native salmonids.

25 7. Plaintiffs American Whitewater and American Rivers have members and supporters who  
26 use and enjoy Chinook salmon, steelhead trout, and bull trout in the Puyallup River specifically  
27 and Puget Sound generally. These members and supporters include anglers who fish in the  
28 Puyallup River and throughout Puget Sound. These members and supporters include those who

1 have spiritual, dietary, aesthetic, and scientific interests in Chinook salmon, steelhead trout, and  
2 bull trout in the Puyallup River and Puget Sound.

3 8. Defendant Electron Hydro, LLC is a limited liability corporation registered in the State of  
4 Washington. Electron Hydro, LLC owns the Project. Electron Hydro, LLC is responsible for  
5 operations of the Project. Electron Hydro, LLC is a joint venture owned by Electron  
6 Management, LLC and by Electron Holdings, Inc. Electron Management, LLC is owned  
7 primarily by Thom A. Fischer.

8 9. Defendant Thom A. Fischer formed or helped form Electron Hydro, LLC. Thom A.  
9 Fischer supervises, manages, or directs staff at the Project. Thom A. Fischer supervises,  
10 manages, or directs operations of the Project. Thom A. Fischer has decided or directed when  
11 water and fish can or cannot enter the flume. Thom A. Fischer has decided or directed when the  
12 forebay at the Project is drained. Thom A. Fischer has applied for permits to perform the  
13 Diversion Repair and Spillway Replacement Project. Thom A. Fischer decided or directed other  
14 elements of the Project, such as components of the Diversion Repair and Spillway Replacement  
15 Project.

16 10. Defendant Tollhouse Energy Company is owned by Thom A. Fischer. Tollhouse Energy  
17 Company is developing hydroelectric projects in the states of Washington and Montana.  
18 Tollhouse Energy Company owns part of Valtec Power, LLC. Valtec Power, LLC owns Black  
19 Creek Hydroelectric Project. Black Creek Hydroelectric Project is affiliated with Electron  
20 Hydro, LLC. Thom A. Fischer uses or has used a Tollhouse Energy Company email for work  
21 associated with the Project. Thom A. Fischer uses or had used a Tollhouse Energy Company  
22 email to correspond with the Washington Department of Fish and Wildlife about obtaining a  
23 Hydraulic Project Approval permit.

24 Facts.

25 11. The Puyallup River originates in glaciers along the slopes of Mount Rainier in the  
26 Cascade Mountains in Washington. The Puyallup River flows approximately 65 miles to  
27 Commencement Bay in Puget Sound. The Puyallup River watershed forms the third largest  
28 tributary to Puget Sound. The Puyallup River watershed encompasses approximately 665,000

1 acres (approximately 1000 square miles). The Puyallup River flows through lands owned by the  
2 Puyallup Tribe of Indians (“Puyallup Tribe”). Members of the Puyallup Tribe have lived in the  
3 Puyallup River basin since time immemorial.

4 12. Nine native salmonid species inhabit the Puyallup River watershed. These species include  
5 Chinook salmon, coho salmon, chum salmon, pink salmon, sockeye salmon, steelhead trout, bull  
6 trout, and cutthroat trout. Certain of these species are important prey for orcas in Puget Sound.

7 13. Historically, the Puyallup River and its tributaries supported approximately 42,000  
8 Chinook salmon (*Oncorhynchus tshawytscha*). In 1999, the National Marine Fisheries Service  
9 (“NMFS”) listed Chinook salmon in Puget Sound, including in the Puyallup River, as threatened  
10 with extinction under the ESA. In 2007, NMFS adopted a Recovery Plan for Chinook. In 2007,  
11 escapement of Chinook in the Puyallup River watershed (including early/spring returns to the  
12 White River) was estimated to be 1,300 fish. Adult Chinook salmon migrate up the Puyallup  
13 River generally from June through October. Adult Chinook salmon in the Puyallup River spawn  
14 generally in September. Adult Chinook salmon in the Puyallup River spawn upstream of the  
15 Project. Chinook salmon in the Puyallup River emerge from redds generally in February.  
16 Chinook salmon in the Puyallup River outmigrate generally in April through June. Chinook  
17 salmon are present at the Project site at least from April through October.

18 14. Historically, the Puyallup River and its tributaries supported approximately 6,000  
19 steelhead trout (*Oncorhynchus mykiss*). In 2007, NMFS listed steelhead trout in Puget Sound,  
20 including in the Puyallup River, as threatened with extinction under the ESA. The current  
21 steelhead population in the Puyallup River watershed is approximately 1,500 adults.  
22 Anadromous steelhead trout migrate up the Puyallup River generally in March through May.  
23 Steelhead trout in the Puyallup River spawn generally in April through June. Steelhead trout in  
24 the Puyallup River spawn upstream of the Project. Steelhead trout in the Puyallup River emerge  
25 from redds generally in June through August. Steelhead trout in the Puyallup River rear in the  
26 river generally for two years. Steelhead trout in the Puyallup River may rear in the river for up to  
27 seven years. Steelhead trout are present in the Puyallup River throughout the year. Steelhead  
28 trout migrate through parts of the Puyallup River throughout the year. Steelhead trout are present

1 at the Project site throughout the year. Anadromous steelhead trout in the Puyallup River  
2 outmigrate throughout the year, with peak out-migration occurring from March to July.

3 15. Historically, the Puyallup River and its tributaries supported bull trout (*Salvelinus*  
4 *confluentus*). In 1999, the U.S. Fish and Wildlife Service (“FWS”) listed populations of bull trout  
5 in the Coastal/Puget Sound region in Washington, including in the Puyallup River, as threatened  
6 with extinction under the ESA. In the Coastal/Puget Sound region, the Puyallup River is one of  
7 eight “core areas” for bull trout. Bull trout populations the Puyallup River include anadromous,  
8 fluvial, and resident populations. Bull trout in the Puyallup River are the southernmost,  
9 anadromous bull trout population in the Coastal Recovery Unit. Maintaining the bull trout  
10 population in the Puyallup is critical to maintaining the overall distribution of migratory bull  
11 trout in the Recovery Unit.

12 16. Bull trout are present at the Project site throughout the year. The Project site provides  
13 foraging, migration, and overwintering habitat for bull trout. Bull trout in the Puyallup River  
14 spawn generally in mid-September to early October. Bull trout in the Puyallup River spawn in  
15 reaches of the river upstream of the Project. Bull trout in the Puyallup River emerge from redds  
16 generally in March through April. In 2004, the Service issued a draft Recovery Plan for the  
17 Coastal/Puget Sound bull trout. The abundance target for bull trout in the Puyallup River is 1,000  
18 adults. Currently, fewer than 100 adult bull trout spawn annually in the upper Puyallup River and  
19 its tributaries.

20 17. The Project is located on the Puyallup River in the foothills of Mount Rainier, about 42  
21 miles southeast of Seattle, in Pierce County. Puget Sound Power & Light Company began  
22 building the Project in 1902 and finished it in 1904. On November 14, 2014, Puget Sound  
23 Energy sold the Project to Electron Hydro, LLC.

24 18. The Project includes a headworks facility at river mile 41.7. The purpose of the  
25 headworks facility is to divert water from the Puyallup River into a flume that carries water  
26 downslope into a powerhouse to generate electricity. Historically, the headworks facility  
27 included a timber crib diversion structure that was approximately 200 feet long and spanned the  
28 river. The diversion structure slows water for diversion. The diversion structure stores water for

1 diversion. The diversion structure creates a pool. The amount of water slowed, stored, or pooled  
2 amounts to approximately 8 acre-feet of water.

3 19. The headworks facility includes an intake immediately upstream of the diversion  
4 structure. The intake exists in the river in the water slowed behind the diversion structure. The  
5 intake exists in the river in the water stored behind the diversion structure. The intake exists in  
6 the river pooled behind the diversion structure. The intake includes an intake window that is a  
7 52-feet wide and five-feet deep opening within a concrete riverbank wall. The intake window  
8 includes a sluice gate. The sluice gate can be opened or shut. When the sluice gate is open, river  
9 water flows through the intake window into a water gallery. The water gallery is a confined  
10 water delivery channel from the intake window to a Tainter gate. The Tainter gate is at the  
11 downstream end of the water gallery at the head of a flume. The Tainter gate can be opened or  
12 shut. When the Tainter gate is open, water in the water gallery flows into a flume.

13 20. The Project includes a flume to transport water downslope from the water gallery into a  
14 powerhouse. The flume is approximately 10.1 miles long. After water enters the flume, it passes  
15 over rock chutes. The rock chutes are designed to divert or flush out of the flume bedload such as  
16 rocks and cobbles. Flows from the rock chutes return to the river. Flows from the rock chutes  
17 attract Chinook salmon. Flows from the rock chutes attract steelhead trout. Flows from the rock  
18 chutes attract bull trout. Flows from the rock chutes impede migration of fish.

19 21. After passing over the area of the rock chutes, water in the flume flows to a settling basin.  
20 The settling basin is approximately 1,600 feet-long. The purpose of the settling basin is to have  
21 sediment in the water settle for removal. No gates or other devices on the flume at the entrance to  
22 or from the settling basin prevent water from continuing downslope. Periodically, Electron  
23 ceases to divert water to clean the settling basin. To cease to divert water, Electron closes the  
24 sluice gate in the intake window. To cease to divert water, Electron closes the Tainter gate in the  
25 water gallery. To clean the settling basin, Electron dredges the settling basin with excavators and  
26 pushes the sediment onto the slope down towards the river with a bulldozer.

27 22. Water exiting the settling basin flows into a forebay above the powerhouse. The forebay  
28 is approximately 20 acres in size. Water from the forebay flows into four penstocks, and then

1 into a powerhouse. The opening of each penstock is covered by a trash rack of steel bars spaced  
2 roughly one inch apart. The powerhouse includes five Pelton wheels each connected to a  
3 generator.

4 23. In 1998, Puget Sound Energy built facilities in the forebay to attempt to capture fish  
5 diverted from the Puyallup River. The purpose of the facilities is to capture fish and transport  
6 them into the Puyallup River downstream of the powerhouse. The facilities include a barrier net.  
7 The facilities include a fish trap. The facilities include a fish holding area. The facilities include  
8 an adjustable weir gate.

9 24. Since 2014, Electron has diverted water from the Puyallup River in order to produce  
10 electricity. Since 2014, Electron has diverted Chinook salmon into the intake, flume, and  
11 forebay. Since 2014, Electron has diverted steelhead trout into the intake, flume, and forebay.  
12 Since 2014, Electron has diverted bull trout into the intake, flume, and forebay.

13 25. When water is diverted from the Puyallup River, different species of fish are diverted into  
14 the forebay. Chinook salmon are periodically present in the forebay. Steelhead trout are  
15 periodically present in the forebay. Bull trout are periodically present in the forebay. Cutthroat  
16 trout are periodically present in the forebay. Coho salmon are periodically present in the forebay.  
17 Fish may be present in the forebay for significant periods of time. Bull trout in the forebay prey  
18 on Chinook salmon. Bull trout in the forebay prey on steelhead trout. Steelhead trout in the  
19 forebay prey on bull trout. Cutthroat trout in the forebay prey on Chinook salmon. Cutthroat  
20 trout in the forebay prey on steelhead trout. Cutthroat trout in the forebay prey on bull trout.

21 26. Periodically, Electron attempts to collect fish in the forebay in order to release them  
22 downstream. The collection or transfer facilities do not capture or collect all Chinook salmon.  
23 The collection or transfer facilities do not capture or collect all steelhead trout. The collection or  
24 transfer facilities do not capture or collect all bull trout. Chinook salmon pass through the trash  
25 rack and are entrained in the penstocks or turbines. Steelhead trout pass through the trash rack  
26 and are entrained in the penstocks or turbines. Bull trout pass through the trash rack and are  
27 entrained in the penstocks or turbines.  
28

27. Some Chinook salmon are harmed or die when captured or collected in the forebay. Some Chinook salmon are harmed or die when the barrier net is maintained. Some steelhead trout are harmed or die when captured or collected in the forebay. Some steelhead trout are harmed or die when the barrier net is maintained. Some bull trout are harmed or die when captured or collected in the forebay. Some bull trout are harmed or die when the barrier net is maintained.

28. Periodically, Electron ceases to divert water in order to dewater the forebay. Electron dewateres the forebay to remove sediment and debris from the bed of the forebay. Electron dewateres the forebay to remove debris from the debris racks at the entrance to the penstocks. To dewater the forebay, Electron closes the sluice gate in the intake window. To dewater the forebay, Electron closes the Tainter gate in the water gallery.

29. Before Electron dewateres the forebay, it attempts to capture or collect Chinook salmon from the forebay. Before Electron dewateres the forebay, it attempts to capture or collect steelhead trout from the forebay. Before Electron dewateres the forebay, it attempts to capture or collect bull trout from the forebay. Some Chinook salmon are harmed or die when they are captured or collected. Some steelhead trout are harmed or die when they are captured or collected. Some bull trout are harmed or die when they are captured or collected.

30. The mean annual flow of the Puyallup River at the headworks facility is 527 cubic feet per second ("cfs"). The Project diverts up to 400 cfs. Diverting water decreases flows downstream in a 10.5-mile section of the Puyallup River. This section of the river is called the "bypass reach" or "middle reach." The diversion of water decreases flows in the bypass reach in varying amounts. In the summer, the diversion of water decreases flows in the bypass reach by up to 50%. In the late fall and winter, the diversion of water decreases flows in the bypass reach up to 70%. In spring and early fall, the diversion of water decreases flows in the bypass reach up to 90%. In the summer, water temperatures in the bypass reach increase 3.8 degrees Fahrenheit. Minimum flows in the bypass reach are 80 cfs from July 15 to November 15, and 60 cfs the rest of the year. The diversion of water reduces available habitat for bull trout in the Puyallup River.



1 31. In 1997, Puget Sound Energy and the Puyallup Tribe entered into a Resource  
2 Enhancement Agreement.

3 32. Approximately 26 miles of fish habitat exists in the mainstem Puyallup River upstream  
4 of the headworks facility. Approximately ten miles of fish habitat exists in tributaries to the  
5 Puyallup River upstream of the headworks facility.

6 33. When the headworks facility was built, it did not include facilities that would allow  
7 Chinook salmon to migrate above it. When the headworks facility was built, it did not include  
8 facilities that would allow steelhead trout to migrate above it. When the headworks facility was  
9 built, it did not include facilities that would allow bull trout to migrate above it.

10 34. In 2000, Puget Sound Energy built a fish ladder on the right (east) side of the river  
11 opposite of the intake. The thalweg of the river is on the left (west) side of the river. The ladder  
12 can function as both a pool/weir system and a roughened channel. To function properly, the  
13 ladder must remain connected to the river channel above and below the headworks facility. To  
14 function properly, flows through the ladder must range between 10 and 52 cfs. This range of  
15 flows through the ladder corresponds to river flows ranging from 160 to 1,100 cfs. To function  
16 properly, flows through the ladder must enable fish to stage before entering the ladder, and allow  
17 fish to jump into the ladder.

18 35. The fish ladder enabled upstream fish passage at the headworks facility for the first time  
19 since the headworks facility was built. Chinook salmon use the ladder and migrate upstream of  
20 the headworks facility, and spawn upstream. Steelhead trout use the ladder and migrate upstream  
21 of the headworks facility, and spawn upstream. Bull trout use the ladder and migrate upstream of  
22 the headworks facility, and spawn upstream.

23 36. Electron has sought to renovate the Project. In a phase 1, Electron proposed to repair the  
24 wooden crib diversion structure and replace the then-existing spillway. Electron proposed to  
25 replace the spillway with a 70-foot wide rubber bladder spillway that could be inflated and  
26 deflated to enable Electron to pass sediment loads and better control flows into the intake. In  
27 phase 1, Electron proposed to install approximately 985 feet of bank protection along the left  
28

1 (west) bank. In phase 1, Electron proposed to place concrete of varying depth in front of the  
2 intake structure to allow for installation of a trash rack and other facilities.

3 37. The U.S. Army Corps of Engineers authorized certain aspects of Electron's proposed  
4 work. Pierce County authorized certain aspects of Electron's proposed work.

5 38. In 2020, Electron began some proposed work. Electron built a coffer dam and diverted  
6 the Puyallup River. Electron lined the diversion channel with approximately 2,400 square yards  
7 of artificial turf. Some of the artificial turf tore. Some of the artificial turf was released into the  
8 Puyallup River. Approximately six cubic yards of rubber pellets from the artificial turf were  
9 released or deposited into the Puyallup River. Amounts of the rubber pellets remain in the  
10 Puyallup River. The amounts of rubber pellets are toxic to fish or other aquatic life in the  
11 Puyallup River.

12 39. In 2020, Electron placed concrete on the left (west) bank of the river upstream of the  
13 headworks facility. Electron placed concrete on the left (west) bank of the river downstream of  
14 the headworks facility. Electron placed concrete near the intake to build a trash rack.

15 40. In 2020, Electron removed the spillway portion of the wooden diversion structure. In  
16 2020, Electron did not replace the removed portion with a rubber bladder spillway. In 2020,  
17 Electron built a rock structure where the removed portion had existed. The rock structure does or  
18 will entrain downstream migrating adult fish. The rock structure does or will entrain downstream  
19 migrating smolts. The rock structure does or will create attraction flows and impede upstream  
20 migration of fish. The rock structure does or will prevent upstream migration of fish.

21 41. In 2020, Electron's work at the headworks facility site rendered the fish ladder  
22 impassable to Chinook salmon for months. In 2020, Electron's work at the headworks facility  
23 site rendered the fish ladder impassable to steelhead trout for months. In 2020, Electron's work  
24 at the headworks facility site rendered the fish ladder impassable to bull trout for months.  
25 Because the fish ladder was rendered impassable for a period of time, most of the run of adult  
26 Chinook salmon to spawning areas above the headworks facility in 2020 was lost.

27 42. On July 29, 2020, Electron dewatered the forebay. A fish biologist for the Washington  
28 Department of Fish and Wildlife was present when the forebay was dewatered. The biologist

1 issued a report of what she witnessed. The biologist estimated “thousands” of fish were killed  
 2 during dewatering, handling or transport. Chinook salmon were killed during the forebay  
 3 dewatering, handling, or transport. Steelhead trout were killed during the forebay dewatering,  
 4 handling, or transport. Bull trout were killed during the forebay dewatering, handling, or  
 5 transport.

6 43. Electron does not possess a federal permit or other federal authorization[s] that authorizes  
 7 it to “take” Chinook salmon in maintaining or operating the Project. Electron does not possess a  
 8 federal permit or other federal authorization[s] that authorizes it to “take” steelhead trout in  
 9 maintaining or operating the Project. Electron does not possess a federal permit or other federal  
 10 authorization[s] that authorizes it to “take” bull trout in maintaining or operating the Project.

#### 11 Claim for Relief.

#### 12 Count One: Violation of the Endangered Species Act.

13 44. Plaintiffs reallege all previous paragraphs.

14 45. Section 9 of the ESA prohibits any person from taking an endangered species. 16 U.S.C.  
 15 § 1538(a)(1)(B). NMFS extended the take prohibition to Chinook salmon and steelhead trout as  
 16 species listed as threatened with extinction. 50 C.F.R. § 223.203(a). FWS extended the take  
 17 prohibition to bull trout as a species listed as threatened with extinction. 50 C.F.R. § 17.31(a).  
 18 The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,  
 19 or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Each of these  
 20 verbs has independent meaning. The ESA defines a “person” to include “an individual,  
 21 corporation, partnership, trust association, or any other private entity . . . .” 16 U.S.C. §  
 22 1532(13). Electron has violated, is violating, and will continue to violate Section 9 of the ESA,  
 23 by causing or committing “take” of Chinook salmon, steelhead trout, and bull trout, through its  
 24 ownership, maintenance, operation, and renovation of the Project.

25 46. The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap,  
 26 capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Each of  
 27 these verbs has independent meaning. “Harass” means “an intentional or negligent act or  
 28 omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to

significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. When Electron lined the Puyallup River with artificial turf, and pellets were released into the river, Electron harmed and harassed Chinook salmon and steelhead and bull trout.

Relief Requested.

1. Declare that Electron has violated the ESA as alleged herein;
2. Order Electron to cease diverting water and fish from the Puyallup River in the period before it obtains incidental take permits from NMFS and from FWS;
3. Order Electron to obviate take of fish caused by the rock structure and the fish ladder, when the latter is not properly operated or is rendered inoperable;
4. Award Plaintiffs their reasonable attorneys’ fees and costs under the ESA;
5. Grant such other relief as the Court deems necessary and proper.

Date: November 6, 2020.

Respectfully submitted,

/s/ Peter M. K. Frost

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